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No. 295

IN THE

Supreme Court of the United States

CLARENCE C. ELMORE, SR.
Petitioner,

vs.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	2
Basis for Federal Jurisdiction in the United States District Court	2
Questions Presented	2
Statutes Involved	3
Statement of the Case	3
Argument—Reasons for Granting the Writ	6
Conclusion	23

Appendix I	1-A
Appendix II	3-A
Appendix III	16-A
Appendix IV	17-A
Appendix V	18-A

CITATIONS

Federal Statutes

United States Code Annotated, Title 28, Section 1254	2
United States Code, Title 26, Section 7201	2

Cases

Alford v. *United States*, 282 U. S. 687 (1931)	17
Barbee v. *Warden*, 331 F. 2d 842, 847 (4th Cir. 1964)	17-21
Berger v. *United States*, 295 U. S. 78, 85, 88 (1936)	9
Brady v. *Maryland*, 373 U. S. 83, 83 S. Ct. 1194 (1963)	2-16

Page

Carlile v. *State*, 129 Fla. 860 (1937) 15

Hamric v. *Bailey*, 386 F. 2d 390 (4th Cir. 1967) 16-21

Jencks v. *United States*, 353 U. S. 657 (1947) 17

LaFeber v. *United States*, 59 F. 2d 388 (3rd Cir.) 13

Mellor v. *United States*, 160 F. 2d 757 (3rd Cir.) 13

Napue v. *Illinois*, 360 U. S. 264 (1959) 17

Pointer v. *Texas*, 380 U. S. 400 (1965) 17

Smith v. *Illinois*, 390 U. S. 129 (1968) 17

United States v. *Berger*, 295 U. S. 628, 55 S. Ct. 633, 79 L. Ed. 1314 (1934) 13

United States v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 60 S. Ct. 811, 84 L. Ed. 1129 13

Miscellaneous

Rezneck, *The New Federal Rules of Criminal Procedure*, 54 Geo. L. J. 1276, 1283-1284 (1966) 17

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Clarence C. Elmore, prays that a writ of *certiorari* issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered in this cause on April 29, 1970.

OPINIONS BELOW

Copy of the judgment of the United States District Court is appended as Appendix I hereto.

The opinion of the Court of Appeals is reported in Fed. (2d) . A copy of the opinion and the judgment of the Court of Appeals is appended as Appendix II.

JURISDICTION

Jurisdiction to review by writ of *certiorari* the judgment of said Court of Appeals entered April 29, 1970, is invoked under the provisions of 28 U. S. C. A. Section 1254. On the 1st day of June, 1970, within said thirty days' period for filing this petition, this Honorable Court, by order, extended the time to file to and including June 20, 1970, which order is appended as Appendix IV.

BASIS FOR FEDERAL JURISDICTION IN THE UNITED STATES DISTRICT COURT

The basis for Federal jurisdiction in the United States District Court was by virtue of an indictment returned against petitioner by the Grand Jury charging petitioner with violation of Section 7201, Title 26, of the United States Code.

QUESTIONS PRESENTED

I. Whether the Petitioner was prejudiced by the closing argument of the Government prosecutor, which was recognized by the Trial Court as flamboyant and by the United States Court of Appeals for the Fourth Circuit as intemperate and inflammatory.

II. Whether or not the Government knowing suppressed and concealed crucial evidence of exculpatory value to the defendant in direct violation of *Brady* vs. *Maryland*, 373, U. S. 83, (1963).

STATUTES INVOLVED

Involved herein is simply Title 26, Section 7201, of the United States Code, a copy of which statute is appended as Appendix III.

STATEMENT OF THE CASE

The Defendant in the trial below was indicted upon two counts of tax evasion, in violation of 26 U. S. C. § 7201. The case was tried to a jury before the Honorable Judge John H. Field, Jr., at Bluefield, West Virginia, and the jury returned a verdict of not guilty as to count one of the indictment and guilty as to count two of the indictment, Petitioner, Clarence C. Elmore, Sr., was sentenced to eighteen months imprisonment and fined Five Thousand Dollars ($5,000.00).

The Petitioner, Clarence C. Elmore, Sr., a citizen of West Virginia, was charged with an attempt to evade income tax in the calendar year 1962 by reporting a taxable income of $6,992.86, when the Government charged that his true taxable income for the said calendar year was $16,772.03. In the second count, the Petitioner was charged with reporting taxable income for the calendar year 1963 of $9,792.65, whereas, the Government charged that his taxable income for the said year was $19,658.62.

The Petitioner was appointed West Virginia Liquor Control Commissioner in January, 1961, at a salary of $10,000.00 a year and remained in that position throughout the taxable years at issue. The Government's proof proceeded as a classic net worth case with proof of assets, liabilities and total expenditures for each year at issue.

The petitioner in a pre-trial motion and at the time of trial moved the court to require the Government to disclose evidence favorable to him. At trial the Government attempted to prove that the petitioner had received unreported taxable income from bribes and called as a witness one Earl Brawley, an employee of a distilling company. Brawley was permitted to testify that he and his superior, John Manning, paid the petitioner a Five Hundred Dollar ($500.00) bribe in 1963 to influence the petitioner as West Virginia Alcohol Beverage Control Commissioner. Brawley thereafter testified that in 1964 a check for Five Hundred Dollars ($500.00) made by the president of the company, John Turner, and payable to Manning was cashed and the proceeds delivered to Elmore. Brawley was conceded to be a surprise witness and it is similarly conceded that prior to his appearance late in the Government's case, the defense had no reason to expect that Manning and Turner were relevant to the case. During the four days which followed Brawley's testimony the petitioner's counsel attempted to find and subpoena Manning and Turner. Turner could not be located and Manning could not be successfully served although located by the marshal's office in Philadelphia, Pennsylvania. Counsel repeated an unsuccessful pre-trial motion for the production and disclosure of exculpatory statements. The Government responded by disclosing a pre-trial statement made by Turner in which he identified the 1964 check as a political contribution to the Democratic Party, of which Elmore was an official, and expressly repudiated any imputation of bribery. The Government concealed and continues to supress a similar statement of exculpatory

value made by Manning, as more fully disclosed in this petition under the argument portion hereof.

In closing arguments to the jury, the Government prosecutor made several intemperate assertions not supported by evidence, and accused the petitioner of "dipping into the till" as an official of the Democratic Party. He inquired of the jury: "If you were contributing money to the party of your choice, would you want your funds to go through the hands of this defendant?" He also accused the petitioner of "kickbacks, payoffs, graft," "bribery payments," "crimes of theft and also of embezzlement," He summarized his argument with an appeal to "strike a heavy blow" at the evil of corruption in government. A sensational series of disclosures of alleged public corruption of West Virginia, as noted by the district court, had generated increased public sensivitity to such charges and increased the possibilities of prejudice from such remarks.

ARGUMENT

REASONS FOR GRANTING THE WRIT

I.

The Government's counsel engaged in misleading inflammatory and prejudicial argument.

In his concluding argument, Charles Love, one of the Government's attorneys in the trial below, issued the following remarks, (O. T. 1495):[1]

> "Ladies and gentlemen, the law places a burden on you and a privilege on you, the privilege of serving on a jury. It places a burden on the United States Attorney also. We can't come before you and jump up and down and wave our arms and attempt to inflame and distort. All we can do is rely on the evidence we have.
>
> "I want to read a sentence to you. It's just a sentence. It isn't much. This sums it up. 'A United States Attorney in criminal cases has an even greater responsibility than counsel for an individual client for the purpose of the individual case. He represents the great authority of the United States and he must exercise that responsibility with a circumspection and dignity the case calls for. The case must rest on evidence, not epithet. If a case is a sound one, his evidence is enough.'"

Unfortunately for the Petitioner, Mr. Love's salutatory remarks to the jury at the conclusion of his argument, were preceded by a cresendo of inflammatory abuse directed toward the Petitioner by both the Government's attorneys, Messrs. Strother and Love,:

1. O. T. refers to the original transcript filed herein from the Fourth Circuit Court of Appeals.

abuse which was neither consentient with the record or the exalted apothegm quoted by Mr. Love.

Perhaps the most egregious example of the argument calculated to evoke indignation and hostility on the part of the jury was contained in Mr. Strother's remarks to the following effect. (O. T. 1455):

> "The factor comes into very striking focus when you consider that Revenue Agent Miller interviewed him on or about June 4th, 1964, and at this time Mr. Elmore well knew that he had been dipping into the till, taking out money from democratic campaign contributions also from flower fund money and from distillers and representatives of distillers, and so he realized he was going to have to do something to try to cover these thousands of dollars of currency expenditures which are shown in Government's Exhibit Number 350."

The torrent of Mr. Strother's abuse continued:

> "Ladies and gentlemen, when you are in the course of your deliberations in the jury room and you are deciding this case as to whether or not this defendant is guilty or innocent, ask yourselves one question with respect to this as to whether or not if you were contributing money to the party of your choice, would you want your funds to go through the hands of this defendant?"

> "Ladies and gentlemen, this case has shown clear evidence of kickbacks, payoffs, graft and most important, of course, here and relevant to you for your consideration, income tax evasion by this individual Clarence C. Elmore, Sr., the defendant, because he did not report those graft

payments, those bribery payments, the kickback payments that he had received on his income tax returns for those years for very obvious reasons —he wanted to conceal them, number one, and he didn't want them to be reported on his income tax returns for those years and identified to all is the second reason."

"Ladies and gentlemen, the evidence in this case shows this defendant to be guilty of not just one crime but several. Among them, as I have said, the payoffs and kickbacks, crimes of theft and also of embezzlement of moneys which he has taken."

"Ladies and gentlemen, during the course of your deliberations I would like for you to consider very carefully those points which I have made to you with respect to the understatement of income for the years 1962 and 1963, bearing carefully in mind that corruption in government is a very dear price for us to have to pay. It cannot be afforded at any time.

"Ladies and gentlemen, I submit that by your verdict and by your consideration of this case you can strike a heavy blow at that evil and can do a very important part in stamping out that thing that none of us want. Thank you very much for your consideration and patience during the course of this trial. Thank you very much." (O. T. 1465 and 1466).

In the consideration of Mr. Strother's remarks, for the purpose of determining their possible prejudicial impact, it is essential that no confusion exists as to proof of, for example, "crimes of theft and also embezzlement": The record is singularly free, totally devoid, of any evidence of any kind or character however slight, that the Petitioner committed any such crimes.

The opinion of Judge Winter for the United States Court of Appeals for the Fourth Circuit, included herein as Appendix II, clearly discloses at page 13 of the opinion, the indisputably intemperate quality of the prosecutor's argument:

> "We disapprove of the prosecutor's remarks. As the Supreme Court held in *Berger* v. *United States*, 295 U. S. 78, 85, 88 (1936), the prosecutor has a constitutional duty to refrain from "insinuations and assertions calculated to mislead the jury * * *" "(and) produce a wrongful conviction." The remarks here were intemperate, unnecessary, and unjustifiable. They needlessly and improperly created a possibility of prejudice to the defendant. We are satisfied, however, that actual prejudice did not occur so that reversal would only serve the purpose of punishing the prosecutor."

Mr. Strother's remarks, during which he ascribed consummate villany to the Petitioner were a fuselage of invective not supported by the evidence; of equal importance in the preception of the inexcusable nature of Mr. Strother's conduct, is a recognition that his pernicious appeal to the jury was neither spontaneous nor inadvertent in the stress of advocacy. The entire record discloses numerous examples of lengthy colloquy between the trial Court and Mr. Strother generated by the Government's effort to introduce through various techniques, items of inflammatory information. The exchanges between the trial Court and Mr. Strother, without exception, reveal a mounting concern on the Court's part to conduct an antiseptic trial, undiluted by inflammatory information of the very kind and relating to the specific matters of purported graft and all the rest, alluded to by Mr. Strother in his concluding

remarks, and upon which was grounded his clarion call for a conviction to "strike a blow" against corruption in Government. The enormity of this prosecutorial misconduct in argument which ascended to a messianic appeal to strike a blow for liberty and purge corruption, considerations ordinarily reserved for prosecutions for far different crimes than income tax evasion, can never be fully appreciated or understood by a partial reading of the record. This venomous seed of prejudice was planted in Mr. Strother's opening remarks, cultivated through repeated efforts to introduce inflammatory materials of no probative value and a successful effort to focus a disproportionate amount of time and attention upon a very few items of a trivial nature, so far as amounts of money are concerned, bearing only inferentially upon the alleged misuse of public office. The Government's effort was culminated by a concluding argument, the critical part of which transformed the nature of the inquiry and issue before the jury from one involving alleged income tax evasion into an inquisition involving public corruption. Thus a trial strategy carefully conceived and brilliantly executed triumphed, to the profound prejudice of the Petitioner, over the effort of the trial Court to inhibit such stratagems.

A full citation of the exchanges between Mr. Strother and the Court relating to inflammatory evidence would cause this petition to be unduly prolix. However, the following exchanges are illustrative:

> "Mr. Strother: That's true, your Honor, and that will also be involved, as I mentioned previously, with the amounts that he has received and also the amounts that he required particular representatives to pay.

This paying and channeling of the funds from representatives of distilleries through his office was done in many forms and many guises. This was just merely one guise that the Government will show that it was done through payoffs and I am using the word loosely now, of money to individuals directed by the Defendant, or at least with his consent and knowledge, as to payments from representatives such as distilleries to those particular individuals or to the Defendant himself.

The Court: If they were payments to the Defendant himself, that would be one thing.

Mr. Strother: Oh, yes.

The Court: But evidence that he used his influence to obtain positions such as this for friends of his and the income was taxable to them, they paid the income tax on it, you do not contend that those salaries were attributable as income to the Defendant, I just think it would be highly prejudicial and inflammatory to this jury and not sufficiently relevant to permit it to come in.

I will be glad to hear from these gentlemen on it, but it occurs to me—" (O.T. 557).

* * *

"The Court. If they were related to an activity which went to the operative elements of the crime with which the man is charged, but when a man is charged with income tax evasion you don't go out here and pick up every indiscretion and maybe even abuse of direction or authority unless it has some relevancy to the issue of his innocense or guilt of the charges in this case and I just don't believe it does have. I will tell you quite frankly that if I were to permit it to come in and if this man were convicted,

I have no doubt whatsoever that the case would be reversed as a matter of course by the Fourth Circuit.

It is inflammatory. It may in some vague manner have some relevancy, but, Mr. Strother, I just don't believe that it is admissible in this case.

Mr. Strother: We respectfully submit, your Honor, this does go to the intent of the defendant. That's what we are mainly interested in.

The Court: I don't think it does and I am going to sustain—I anticipate an objection from the defense on it and I certainly am constrained to sustain their objection." (O. T. 559).

* * * *

"Mr. Strother: Mr. Christian, as shown by his return, reported that money on his return. I should say, your Honor, that the evidence is quite clear he performed no service whatsoever.

The Court: All right. Let's assume he didn't. Let's assume that it was part of the pattern of doing business with the State of West Virginia, but that's not the issue we are trying in this case.

Mr. Strother: I submit, your Honor, it does go to intent.

The Court: It may go to intent, but I am not at all sure it goes to the intent, again in the pattern of this case that we are trying here." (O. T. 571)

At the conclusion of Mr. Strother's remarks the defense made a motion for mistrial (O. T. 1468), which motion was denied. Thereafter, the Court indicated its intention to incorporate in its charge corrective

statements regarding Mr. Strother's argument and defense counsel requested that such remarks be included in the charge, (O. T. 1473). Through perhaps inadvertence, no such cautionary remarks were included in the charge.

The premiere case in the United States upon the subject of the propriety of argument is *United States* v. *Berger*, 295 U. S. 628, 55 S. Ct. 633, 79 L. Ed. 1314, (1934). The *Berger* case, *supra*, and a host of succeeding cases (e. g. *Mellor* v. *United States* 8th Cir., 160 F. 2d 757, at 765; *LaFaber* v. *United States* 8th Cir., 59 F. 2d 588, at 599; *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150 239-240, 60 S. Ct. 811, 852, 84 L. Ed. 1129), hold that every improprietious argument calculated to inflame, must be considered within the frame of reference of each individual case. Consequently, it remains to assess of the probable, impact, to place in the prospective of the Petitioner's trial, the inflammatory remarks of which the Petitioner so vigorously complains.

We submit that Mr. Strother's argument at the place and time of the Petitioner's trial constituted volatile fuel to a raging fire of public indignation toward imputations of public corruption. The legal importance of this consideration is indisputable. The extent and fact of such public animus was cogently summarized by the trial court (O. T. 1589), when speaking to Mr. Perry, counsel for Petitioner.

> "I agree with you further, and I think in justice to the Defendant that this Court recognizes that this case came on for trial at a time when the public generally in this state, whether rightly or wrongly, was highly sensitive to allegations of misconduct in public office.

> We had the unfortunate trial which you participated in which had been concluded just shortly before the start of this trial involving former Governor Barron and Mr. Sawyers and others. We had Mr. Trent, who had been identified with a former administration, under indictment and all of these things did, I think, create an atmopshere, but I don't think that I would be justified in taking that atmosphere and saying that, along with the remarks of Mr. Strother, would justify me in setting aside the verdict in this case.
>
> As I say, they are there and I think they are actualities to which you, if you see fit to take this case to the Court of Appeals, might properly advert to on this particular point of your motion."

Truly, the prosecutor's slander was to the hour born: A time at which virtually every public official had been adjudicated guilty in the court of public opinion and all were widely regarded as knaves. The United States Attorneys were not naive; their departure from fair comment was well calculated to inflame, rather than enlighten. The measure of their success is reflected in the verdict; a verdict, we submit, impaired by prejudice.

Although courts cannot attain perfection in the administration of criminal justice or insure results free of contamination from the prodigious fountainhead of human prejudice, our courts do not lack power to restrain the counsel for the Government from intemperate departures from their high mission. Nor do courts lack the power and, indeed, they possess the responsibility, to correct a verdict deliberately sought by the Government against one of its citizens, through

an appeal to well known public indignation and passion. The quality of prejudice and the consequences of its introduction into a trial was never more succinctly stated than by Judge Terrell in *Carlile* v. *State*, 129 Fla. 860, 865 (1937):

> "It is doubtful if the sinister influence of the remarks . . . made to the jury . . . could be erased by withdrawal or any admonition the Court could give. In fact, this thing of softening prejudices and erasing sinister influences once created is extremely tenuous and of doubtful consummation and if it is in the nature of a prejudice, it is more difficult to get rid of . . . It clings to the mind like a tatto on the epidermis."

We urge no more than this: error in the conduct of trials is inevitable and frequently inconsequential; however, no citizen's liberty should rest in the balance of scales upon which has been placed, by the heavy hand of the sovereign, an appeal to prejudice and passion. The first function of a fair tribunal is to prevent such iniquities. The Petitioner may never secure a trial in a vacuum of perfection; nevertheless, minimum standards of justice require that his destiny be secure from foul blows deliberately administered by the Government.

II.

The Government suppressed and continues to conceal evidence of exculpatory value to the petitioner.

The most devastating evidence of the Government, was the testimony of the witness Brawley, previously referred to herein. Contrary to the previous pleadings of the Government, exculpatory information was con-

tained in the Government's file relating to the witness Brawley. In point of fact, the Government had interviewed witnesses and had information which directly impeached or contradicted the testimony of the witness Brawley. (O. T. 1050).

Because this exculpatory information, of indisputably profound value to the Petitioner, was deliberately concealed by the Government until well into the Petitioner's case, the defense was thereby denied the opportunity to adduce the testimony of John Turner and John Manning.

The importance of the Brawley testimony to the Government's case is beyond question and the Government at the trial did not challenge the fact that, (O. T. 1051):

> "* * * the genesis of that interview must have been that the government had possession of the Brawley information."

The Government, nevertheless, concealed the exculpatory character of the information at issue, and misrepresented in its pretrial pleadings, the very fact of its existence. It is difficult to imagine prosecutorial concealment of exculpatory evidence more violative of the spirit of *Brady* v. *Maryland*, 373 U. S. 83, S. Ct. 1194 (1963).

Hamric v. *Bailey*, 386 F. 2d 390 (4th Cir. 1967), contains two sentences in which the court summarized the *Brady* doctrine, insofar as it was operative in that case and is similarly applicable to the facts the instant case, at page 393:

> "Finally, on the issue of suppression, we conclude that the disclosure of the undisclosed evidence after the jury had retired was too late to overcome the requirements of *Brady*. It is incumbent on the State to disclose evidence favorable to an accused, manifestly, that disclosure to be effective must be made at a time when the disclosure would be of value to the accused."

That Court has similarly held in *Barbee* v. *Warden*, 331 F. 2d 842, 847 (4th Cir. 1964), denying a defendant the benefit of evidence in the hands of the Government involves "a question of fundamental fairness rising to the level of constitutional due process which cannot be brushed aside as mere error in an evidentiary ruling." The entire adversary system of justice is predicated upon the concept that the truth may emerge through cross-examination and the defendant's right to cross-examine is at the apex of the holding in *Pointer* v. *Texas*, 380 U. S. 400 (1965); and that right is clearly violated when the Government is allowed to withhold evidence which might assist the defendant in impeaching the testimony of a prosecution witness, *Smith* v. *Illinois*, 390 U. S. 129 (1968); *Alford* v. *United States*, 282 U. S. 687 (1931); *Jencks* v. *United States*, 353 U. S. 657 (1957); Cf. *Napue* v. *Illinois*, 360 U. S. 264 (1959); Rezneck, THE NEW FEDERAL RULES OF CRIMINAL PROCEDURE, 54 Geo. L. J. 1276, 1283-84 (1966).

Even the opinion of the Fourth Circuit Court of Appeals pays its respects to the "unjustifiable delay of which the Government was guilty in this case" and notes at page 10 of the opinion:

> "The government should have promptly disclosed the statement as soon as Brawley was

called as a witness. At that point there was no further justification for withholding it, and we do not think that the government should be allowed to await a repeat request."

However, the Fourth Circuit Court of Appeals erroneously concluded that the Government had represented to, or informed the district court that it possessed no statements made by Manning, see footnote 4 at page 7 of the opinion. Of the two men, Turner and Manning, it is clear that Manning's evidence would have been more crucial than that of Turner. The Government never informed the district court that it possessed no statement of Manning and in this respect the Court of Appeals was clearly in error. There is nothing in the record to suggest that the Government ever made such a representation to the district court.

In response to this erroneous conclusion contained in the opinion of the Court of Appeals, the petitioner herein filed a petition for a rehearing in the United States Court of Appeals for the Fourth Circuit. In order to focus attention upon the error committed by the Court of Appeals, a full excerpt commencing on page 3 of the said petition which is a part of the record herein filed, follows:

> **"II. The Appellant is particularly aggrieved by the holding of this Honorable Court to the effect that he was not denied a fair trial in violation of Brady v. Maryland.**
>
> We limited the discussion herein on this point to what counsel believes is a clearly erroneous impression on the part of this Honorable Court of what occurred during the trial, particularily with a view to the perspective witness Manning.

First it is clear that the Appellant both at a pretrial and at the trial stages of this case moved for the disclosure of any exculpatory statements. As noted by this Honorable Court's opinion on page 10, the government was guilty of an "unjustifiable delay" in this disclosure of an exculpatory pre-trial statement made by Turner to an Internal Revenue Service agent. The Appellant is particularily aggrieved by the failure of the government to disclose an exculpatory statement in its possession of the prospective witness Manning. The Court's opinion discloses in foot note number 4 at page 7 of the opinion, that this Court believes the government informed the District Court that it had no statement made by Manning to government agents. Everything stated in footnote number 4 on page 7 of the opinion, is, we respectfully submit, strictly incorrect and the assertions in footnote number 4 are not supported by anything in the record. It may be recalled that the Appellee upon argument of this case by John M. Brant, offered to inform or advise this Honorable Court by letter whether or not the government in fact possessed any such statement made by Manning; however, the government failed to so inform the Court because, we assert, such a statement of exculpatory value is possessed and still concealed by the government. Alert to this fact, counsel for the Appellant immediately after the argument of this case traveled to Pennsylvania and procured from John Manning an affidavit relating to this matter under the most antiseptic conditions. The affidavit was prepared by and executed in the office of Manning's counsel, Harry R. Mayer of Philadelphia. The original of this affidavit is forwarded to the Clerk of this Court to be filed, and is herein set forth in full:

AFFIDAVIT

STATE OF PENNSYLVANIA, :
: SS.
COUNTY OF PHILADELPHIA, :

This day personally appeared before the undersigned authority one JOHN MANNING, who, after being first duly sworn, deposes and says as follows:

That in November or December of 1967, one Jerome Gulock, a Special Agent for Internal Revenue Service, contacted him in regard to a Clarence C. Elmore and requested that he come to Baltimore, Maryland, for the purpose of a meeting. The parties were unable to meet in Baltimore, but did meet in the Philadelphia Office of I.R.S., 401 North Broad Street, Philadelphia, Pennsylvania.

That at the time he met Gulock he made a statement in which he advised Gulock that at no time had he ever paid any money to Clarence C. Elmore or anyone else for liquor listings in the State of West Virginia.

Your deponent further states that in September of 1968, he received a call allegedly from the United States Marshal's Office that a subpoena existed summonsing him to Bluefield, West Virginia, to testify in the Elmore trial. That he did not appear because he did not know the true origin of the phone call and was not physically served with any subpoena to appear at the Elmore trial. Since he was not personally served, he did not appear.

Your deponent further says that prior to December 8, 1969, he was never contacted by any attorney for Clarence C. Elmore.

Your deponent further states that he advised Clarence C. Elmore, after his trial, that Gulock had spoken to him as mentioned aforesaid.

S/ John Manning
John Manning

Taken, subscribed and sworn to before me this the 12th day of December, 1969.

My commission expires December 31, 1972.

S/ Jane L. Hummel
Notary Public

The foregoing affidavit emphatically establishes that the government did not disclose exculpatory information in its possession either before or during the trial; thus, this case falls clearly within *Hamrick* v. *Bailey*, 386 F. 2d 390, 392-93 (4 Cir. 1967); *Barbee* v. *Warden*, 331 F. 2d 842, 847 (4th Cir. 1964). It is equally clear from the foregoing affidavit and the record as well, that the defendant did all within his power to procure the attendance of Manning by having a subpoena issued, which the United States Marshal was not able to execute upon Manning. Moving for continuance was futile in view of the trial Court's statements, R. p. 1167-1170.

The simple fact of the matter is, that the government failed to disclose and continues to conceal a statement which contradicts the testimony of the only witness, Brawley, whose evidence distinguishes taxable years 1962 and 1963 and which the Honorable Court itself has recognized must have formed or contributed to the basis of conviction in this case. The contradiction between the Manning affidavit and the information given by Manning to the government and Brawley's testimony, could not be more

striking and exact; its impact upon the outcome of the trial might well have been crucial. The denial of this information to the defendant robs that *Brady* doctrine of all vitality. We implore this Court to grant the Appellant a rehearing upon this vital issue in order that these questions may be fully elucidated by both the Appellant and Appellee.

The importance of the Manning affidavit, *supra*, requires, in our view, that this Honorable Court review the exculpatory impact of Manning and Turner and the insupportable failure of the government to produce Manning's statement given to Internal Revenue agent Gulock."

The Court of Appeals denied the petition for rehearing by order herein included as Appendix V.

It has been recognized at every stage of this case from the date of jury verdict that the only plausible basis upon which a verdict of guilty on count two of the indictment could have been returned, was the testimony of Brawley, moreover, it is equally clear that Brawley's testimony was the only evidence adduced of bribery or any related misconduct. Consequently, the Government's suppression of the Manning statement, for example, constitutes a decisive departure from the mandate of *Brady*. If the Government can succeed in concealing and suppressing the statement of Manning and succeeds in an admittedly "unjustifiable delay" in the revelation of Turner's statement, the *Brady* doctrine will be reduced to an esoteric concept of no operative value to any accused. It is difficult to postulate a clearer example of the utter failure of federal courts to require the disclosure of exculpatory evidence, first in a timely manner and second to require

the disclosure of its very existence. The instant case presents this Honorable Court with the opportunity and it is respectfully submitted, the necessity of restoring vitality to the *Brady* doctrine and affirming its relevance to the administration of criminal justice.

CONCLUSION

The conviction of the petitioner was produced by two insults to due process: the suppression of exculpatory evidence and an outrageously excessive appeal to passion and prejudice upon the very issue regarding which exculpatory evidence unknown to the defendant, was concealed. While many other technical errors have already been adjudicated by the Court of Appeals, a conviction in what is recognized to be a marginal prosecution, should not be permitted to stand upon such fundamental departures from due process. Petitioner, therefore, respectfully submits that this petition for a writ of *certiorari* should be granted.

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Attorney for Petitioner.

OWEN GRIFFITH
Princeton, West Virginia

WALTER BURTON
Princeton, West Virginia
Of Counsel

APPENDIX I.

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
At Charleston

UNITED STATES OF AMERICA

vs. : CR. No. 1990—Upon Indictment for Vio. of T. 26, Sec. 7201, U. S. C.

CLARENCE C. ELMORE, SR.

JUDGMENT

On this 14th day of November, 1968, came the attorney for the government and the defendant appeared in person and by Robert G. Perry, Walter W. Burton and Owen R. Griffith, his counsel.

IT IS ADJUDGED that the defendant upon his plea of not guilty and a verdict of guilty as charged in the second count of the indictment herein, returned by a jury on September 25, 1968, has been convicted of the offense of violation of Title 26, Section 7201 United States Code, as charged. And this case came on for a hearing on the defendant's motion for a new trial. And the Court having heard arguments of counsel and considered same, is of the opinion to and does hereby deny said motion, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of EIGHTEEN MONTHS pursuant to and for the purposes set forth in sub-section (a) (2) of Section 4208, Title 18, United States Code, and that the defendant may become eligible for parole at such time as the Board of Parole may determine.

IT IS ALSO ADJUDGED that the defendant, Clarence C. Elmore, Sr. pay a fine to the United States in the sum of FIVE THOUSAND DOLLARS and in default of payment of the fine heretofore imposed, the defendant to stand committed until the same is paid or he is otherwise released according to law.

IT IS ORDERED that the defendant shall have ten days from this date within which to file a notice of appeal, and that the defendant's bond during the pendency of his appeal shall be in the amount of $2500.00, with surety approved by the Clerk of this Court.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

(Signed) JOHN A. FIELD, JR.
United States District Judge

(Entered November 14, 1968
Criminal Order Book 3, Page 332)

APPENDIX II.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 13,067

United States of America, *Appellee,*
vs.
Clarence C. Elmore, *Appellant.*

Appeal from the United States District Court for the Southern District of West Virginia, at Charleston. John A. Field, Jr., Chief Judge.

(Argued December 3, 1969 Decided March 16, 1970.)

Before WINTER and CRAVEN, Circuit Judges, and HARVEY, District Judge.

Robert G. Perry (Owen Griffith and Walter Burton, on brief) for Appellant, and John M. Brant, Attorney, Department of Justice (Johnnie M. Walters, Assistant Attorney General, Joseph M. Howard, Attorney, Department of Justice, and Wade H. Ballard, III, United States Attorney, on brief) for Appellee.

WINTER, Circuit Judge:

Clarence C. Elmore has appealed from the judgment entered on his conviction for violation of 26 U.S.C.A.

§ 7201. He was indicted in two counts of wilfully attempting to evade federal income taxes by filing false and fraudulent returns which understated his taxable income and consequent tax liability for the years 1962 and 1963. The jury acquitted as to 1962, but returned a verdict of guilty on the 1963 count. We affirm.

Elmore's assigned errors and the context in which they arose are set forth below.

I

At trial the government employed the net worth plus nondeductible expenses method in order to establish its case. As a part of this process evidence of Elmore's reported and corrected taxable income and expenditures during 1962 and 1963 was introduced. He claims that two items of evidence were improperly admitted against him.

The first was a notebook which the government subpoenaed from a woman who had been Elmore's receptionist in 1962-1963. The notebook contained data relating to his travel expenses. Elmore claimed that the notebook was his personal property and moved to suppress. At the hearing on the motion the district judge indicated that he would "probably" admit the evidence if and when it was offered, but he apparently made no formal ruling on the matter at that time. When the government subsequently offered the notebook at trial, however, defense counsel stated that he had no objection to its admission.

We think that under these circumstances the affirmative statement that defendant did not object consti-

uted a conscious and knowing relinquishment of any right to have the notebook suppressed. *Lawn* v. *United States*, 355 U. S. 339, 353-55 (1958); *Johnson* v. *Zerbst*, 304 U. S. 458, 464 (1938). But in any event, despite some self-contradiction, the receptionist's testimony taken as a whole makes it clear that the records in the notebook were compiled on her own initiative to assist her in the performance of her own duties. Therefore, we conclude that the records were not Elmore's private books and that their compulsory production did not violate any constitutional stricture.[1] *Cf.*, *Boyd* v. *United States*, 116 U. S. 616, 634-35 (1886).

The government also introduced a document in which Elmore's son-in-law, Patrick West, had recorded mortgage payments which Elmore had made to West.[2] The district court admitted the document on the theory that it was characterized by sufficient "guarantees of trustworthiness" to take it out of the hearsay rule. This conclusion appears to have been rested on two grounds: (1) the federal business records statute, 28 U.S.C.A. § 1732, and (2) the exception to the hearsay rule for declarations against interest.[3]

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1. Elmore's constitutional claim is not stated with precision and is unclear to us. If he is claiming that the subpoena constituted a search without a warrant or probable cause, we think that the claim is without merit.

2. The government actually introduced a photocopy of the document which had been made by an Internal Revenue Service agent. The defendant at trial and here made no objection to the fact that a copy was used.

3. The district judge seemed to rely primarily on § 1732. Nevertheless, on two occasions he noted that the document contained information which was financially adverse to West. Even if the decision was bottomed solely on § 1732, we could sustain the admission of the document on the basis of a ground that the district judge did not consider—regardless of the correctness of the ground upon which he actually relied. McCormick, *Law of Evidence* (1954 ed.) § 52, at 118 n. 26.

We need not decide whether or not this document would be admissible under § 1732, for we have concluded that it constitutes a declaration against West's pecuniary interest. The document is a declaration by West that the debt which Elmore owed him had been reduced by the amount of the recorded payments. The requirement that the declarant be unavailable to testify is satisfied by the fact that West successfully asserted his fifth amendment privilege against self-incrimination and declined to answer any questions about the matter. McCormick, *Law of Evidence* (1954 ed.) § 257, at 554 n. 11. Finally, on cross-examination Elmore himself identified the document and admitted all of the payments which it disclosed.

II

Elmore also claims that the government violated the principle enunciated in *Brady* v. *Maryland*, 373 U. S. 83 (1963), by failing, upon request, to disclose material evidence favorable to the accused.

At trial the government attempted to prove that Elmore had received unreported taxable income from bribes which he accepted as commissioner of the West Virginia Alcohol Beverage Control Commission. The government called as a witness a certain Brawley, who had been employed during 1963 by a distilling company. Brawley testified that he and his superior, a man named Manning, paid Elmore a $500 bribe in 1963 to secure the privilege of having their brand of liquor sold in the West Virginia state liquor stores. According to Brawley, Manning obtained the $500 from the company but the source within the company was not disclosed.

Brawley was then permitted to testify to a similar bribe in 1964. At that time a check for $500 had been made out by the president of the company, John Turner, and made payable to Manning. Brawley did not say why Turner sent this check to Manning, but he did testify that on the latter's orders he cashed the check and arranged for the proceeds to be delivered to Elmore in return for a continuation of the privilege of doing business in the state liquor stores.

Brawley was apparently a surprise witness, and we assume that prior to his appearance on the stand the defense had no reason to expect that Manning and Turner were in any way relevant to the case. During the four days which followed Brawley's testimony, defense counsel attempted to find, interview, and subpoena Manning and Turner. Manning was located, and the defense expected to present him as a witness, but for reasons which do not appear in the record he never took the stand.

Turner could not be located, however. Counsel then repeated an unsuccessful pretrial motion for the production and disclosure of any exculpatory statements made by Turner.[4] The government responded by disclosing a pretrial statement made by Turner to an Internal Revenue Service agent. In this statement Turner claimed that he had intended the 1964 check to be used as a political contribution to the Democratic Party, of which Elmore was an official. He also denied that bribery was his purpose.[5] Defense counsel then

4. Defense counsel expressly declined to make any such motion with respect to Manning because he was expected to appear. The government informed the district court that it had no statements by him.

5. Turner refused to make this statement under oath and declined to submit an affidavit until he had consulted with his lawyer. No affidavit appears in the record. These facts suggest that if called as a witness, Turner may have claimed his right not to incriminate himself.

moved for a directed verdict or a mistrial on the ground that the government's belated disclosure violated *Brady*.[6] We think the district court's denial of the motion was correct.

In *Brady* the Supreme Court held that the prosecutor has a duty, upon request, to disclose material evidence favorable to the accused. On two occasions we have applied this doctrine. *Hamric* v. *Bailey*, 386 F. 2d 390, 392-93 (4 Cir. 1967); *Barbee* v. *Warden*, 331 F. 2d 842, 847 (4 Cir. 1964). See also *United States ex rel. Meers* v. *Wilkins*, 326 F. 2d 135 (2 Cir. 1964). In all three of these cases, however, the government did not disclose exculpatory information in its possession either before or during trial. In each the information suppressed was unquestionable exculpatory; here its excusatory effect was more questionable.

In *Hamric* we held that "disclosure to be effective must be made at a time when the disclosure would be of value to the accused." 386 F. 2d at 393. *E.g.*, *United States* v. *Gleason*, 265 F. S. 880, 885 (SDNY 1967). Manifestly, a more lenient disclosure burden on the government would drain *Brady* of all vitality. Against the background of this holding, Elmore claims that disclosure here was of no value to him because it came so late in the trial that he was unable through due diligence to secure Turner's presence. Turner's relevance was first disclosed in Brawley's testimony on September 16, 1968. The defense opened its case on September 19. The trial ended on September 25.

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6. At trial and on appeal Elmore contends that the government had earlier asserted that it possessed no exculpatory statements, but he points to nothing in the record to sustain this assertion and we have found nothing. In fact, the government's consistent position before trial was that Elmore was not entitled to disclosure at that time.

During the interim the court recessed for two full days and for most of a third. Even if we assume, however, that this time was insufficient for reasonable efforts to be successful, we note that defense counsel did not request a continuance for whatever further time might have been necessary.

Furthermore, under these circumstances we think that at the most the government should have only been required under *Brady* to disclose Turner's statement after Brawley had testified. If the statement has been produced in response to Elmore's pretrial motion for disclosure, there was a substantial probability that Brawley would have been suspected as a surprise hostile witness.[7] This would have created a possibility of intimidation of Brawley. In this case the government's concern to protect its case from such influences was justifiable. At a pretrial hearing evidence was introduced that in a previous case Elmore had attempted to intimidate government witnesses and agents. Although the district court did not expressly rely on this evidence in denying Elmore's pretrial motion, we are not precluded from resting upon it, especially when the defendant does not question its accuracy. *Cf.*, McCormick, *Law of Evidence* (1954 ed.) § 52, at 118 n. 26.

The government should have promptly disclosed the statement as soon as Brawley was called as a witness. At that point there was no further justification for

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7. Elmore does not claim on this appeal that the government should have disclosed the names of its witnesses before trial. See *United States* v. *Chase*, 372 F. 2d 453, 466 (4 Cir.), *cert. den.*, 387 U. S. 907 (1967). But see *e.g.*, *People* v. *Lopez*, 60 Cal. 2d 223, 384 P. 2d 16, 28-30, 32 Cal. Rptr. 424 (1963), *cert. den.*, 375 U. S. 994 (1964); Brennan, *Remarks on Discovery*, 33 F. R. D. 47, 65 (1963).

withholding it, and we do not think that the government should be allowed to await a repeat request. *Cf., Fed. R. Crim. P.* 16 (g). Nevertheless, the unjustifiable delay of which the government was guilty in this case did not prejudice the defendant, for Turner's relevance was disclosed by Brawley's testimony, Elmore's efforts were promptly undertaken to secure Turner's appearance, and the statement was produced well before the end of the trial. *Fed. R. Crim. P.* 52 (a); *Chapman* v. *California*, 386 U. S. 18 (1967).

Finally, aside from the risk that if produced as a witness Turner might have invoked his constitutional right not to testify, he would have been of little assistance to Elmore even if he had testified that the check was given to Manning to deliver as a campaign contribution and not as a bribe. Such testimony would not necessarily have contradicted Brawley because Manning could have used the funds for bribe even though Turner intended them as a political contribution. Also, Brawley only testified that the funds came from Turner and did not attempt to identify Turner's purpose. Moreover, for the same reason, Turner could not have provided strong support for Elmore's assertion that the 1964 money was offered by Manning and accepted by him as a political contribution. In short, the slim exculpatory effect of Turner's testimony adds additional support for our conclusion, stemming from the other consideration that we have discussed, that Elmore was not denied a fair trial in violation of *Brady*.

III

In his closing arguments to the jury, the government prosecutor made several intemperate assertions

which the defendant claims were so inflammatory and prejudicial as to deny him a fair trial.[8] Repeatedly the prosecutor asserted that the defendant had been "dipping into the till" as an official of the Democratic Party. These remarks finally led him to ask the jurors "if you were contributing money to the party of your choice, would you want your funds to go through the hands of this defendant?" He also made reference to "evidence of kickbacks, payoffs, graft," "bribery payments," "crimes of theft and also of embezzlement." After reminding the jurors that corruption in government is expensive, he urged them to "strike a heavy blow at that evil * * *." As the district court indicated, a series of disclosures of corruption in West Virginia had created an unusual public sensitivity to such charges and thus increased the possibility of prejudice. Nevertheless, he denied the defendant's motion for a new trial.

We disapprove of the prosecutor's remarks. As the Supreme Court held in *Berger* v. *United States*, 295 U. S. 78, 85, 88 (1935), the prosecutor has a constitutional duty to refrain from "insinuations and assertions and assertions calculated to mislead the jury * * *" [and] produce a wrongful conviction." The remarks here were intemperature, unnecessary, and unjustifiable. They needlessly and improperly created a possibility of prejudice to the defendant. We are satisfied, however, that actual prejudice did not occur so that reversal would *only* serve the purpose of punishing the prosecutor. For this purpose a reversal would be, in Judge Learned Hand's words, "an immoderate

8. Elmore also compains of inflammatory remarks made during the trial, but the only remarks which he specifies were made outside the presence of the jury.

penalty," *United States* v. *Lotsch*, 102 F. 2d 35, (2 Cir.), *cert. den.*, 307 U. S. 622 (1939).

Much of the possibility of prejudice created by these remarks could have been prevented or at least ameliorated had defense counsel promptly attempted to intervene and object. Instead, counsel sat silently throughout the entire summation. Only at its conclusion did counsel act, and then it was not to request cautionary instructions, but to move for a mistrial.

In *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 238-39 (1940), the Supreme Court held that

> "[C]ounsel for the defense * * * cannot remain silent, interpose no objections, and after a verdict has been returned seize for the first time on the point that the comments to the jury were improper and prejudicial."

See also *Birnbaum* v. *United States*, 356 F. 2d 856, 866 (8 Cir. 1966); *United States* v. *Ramos*, 268 F. 2d 879, 880 (2 Cir. 1959). We think that the concern for judicial efficiency and adversary fairness which the *Socony* Court evidenced also requires defense counsel promptly to make his objection known so that the district judge can quickly caution the jury and prevent further prosecutorial intemperance.

In *Socony*, however, the Supreme Court also indicated that even in the absence of a timely objection an appellate court could in "exceptional circumstances" notice intemperate remarks if they were "obvious, or if they otherwise seriously affect[ed] the fairness, integrity or public reputation of [the] judicial proceedings." *Id.*, at 239. The Court also held that a prose-

cutor's statements can be "undignified and intemperate" and fail to "comport with the standards of propriety to be expected" without prejudicing the defendant:

> "[E]ach case necessarily turns on its own facts. And where * * * the record convinces us that these statements were minor aberrations in a prolonged trial and not cumulative evidence of a proceeding dominated by passion and prejudice, reversal would not promote the ends of justice."

Id., at 239-240.

We think that this conviction survives these various standards. First, a reading of the entire argument before the jury leaves us with the "firm conviction" that the prosecutor's intemperate remarks were relatively "isolated" and "not at all reflective of the quality of the argument as a whole." *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 242 (1940). The remarks of which Elmore complains comprise at most only about a dozen lines in approximately forty-five pages of government summation. See *United States* v. *Ramos*, 268 F. 2d 879, 880 (2 Cir. 1959). Furthermore, the district judge, whose feel for the realities of this episode was necessarily more acute than our own, concluded that the remarks were not "that prejudicial" so as to warrant a new trial. In short, this case is a far cry from *Berger* where the Supreme Court found that prosecutorial "misconduct was pronounced and persistent, with a probable cumulative effect upon the jury which cannot be disregarded as inconsequential." 295 U. S. at 89. See also *e.g.*, *Viereck* v. *United States*, 318 U. S. 236, 247-48 (1943) (dictum); *Wallace* v.

United States, 281 F. 2d 656, 667-68 (4 Cir. 1960); *United States* v. *American Die and Instrument Works, Inc.*, 213 F. 2d 731, 732-34 (3 Cir. 1954).[9]

Second, the district judge's instructions were sufficient to dissipate most if not all of whatever prejudice had been engendered. He carefully defined the elements of the offense of tax evasion. *Beard* v. *United States*, 222 F. 2d 84, 95 (4 Cir.), *cert. den.*, 350 U. S. 846 (1955). He cautioned the jury not to concern itself "with the mores of the operation of the Democratic Party or the handling of political contributions." He also advised the jury on the limited relevance of Brawley's testimony. Finally, one of the government attorneys fully explained to the jury that the only crime that they should consider was federal tax evasion.

While these instructions omitted any specific caution to the jury with respect to the prosecutor's remarks, we think that defense counsel was at least partially responsible for this omission. Although counsel indicated after he moved for a mistrial that he wanted a specific charge, from later events the district judge was understandably left with the impression that the defense did not want the matter brought to the jury's attention again; as defense counsel himself admitted at trial. *Cf.*, *Johnson* v. *United States*, 318 U. S. 189,

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9. In *Berger* the Supreme Court suggested that "[i]f the case against Berger had been strong, or * * * the evidence of his guilt 'overwhelming,'" his conviction might not have been reversed for improper remarks. 295 U. S. at 89. On this record we cannot appraise the strength of the case, and its strength, or lack thereof, is not a factor in our decision. That it is not a strong case is suggested by the fact that the jury acquitted on the 1962 count on much of the same evidence on which it convicted for 1963. But the 1963 count was a stronger case because of the addition of the testimony of Brawley. Thus, the whole case rested upon an assessment of the credibility of Brawley, the defendant, and others, as the district judge repeatedly emphasized in his instructions, and these are factors that we cannot assess.

201 (1943). Although the district judge inadvertently neglected to give such an instruction in a second series of instructions to the jury before it retired, defense counsel did not remind him and did not bring it to his attention after he had finished. In any event, since the jury acquitted on one of the two counts, we are not without some assurance that the instructions which were given were adequate to ensure that the jury was not diverted from its duty. *Beard* v. *United States*, 222 F. 2d 84, 95 (4 Cir. 1955).

Finally, the prosecutor's several references to corruption rested on "a reasonable basis in the evidence," as Brawley's testimony, for example, indicated, and the government was entitled to make some reference to these matters since they related to the source of the unreported income. *United States* v. *Sawyer*, 347 F. 2d 372, 374 & n. 5 (4 Cir. 1965).

IV

Lastly, Elmore claims that the jury verdicts of acquittal on count one and guilty on count two were inconsistent. This claim is without merit. A sufficient answer is to repeat that Brawley's testimony related only to the 1963 count and that the district judge repeatedly instructed the jury to consider the two counts separately.

Affirmed.

APPENDIX III.

26 USC, Section 7201

Section 7201—Attempt to evade or defeat tax.

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000.00, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

APPENDIX IV.

No. _____, October Term, 1969

CLARENCE C. ELMORE, *Petitioner*,

vs.

UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon Consideration of the application of counsel for petitioner,

It Is Ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including June 20, 1970.

/s/ WEB

Chief Justice of the United States.

Dated this 1st day of June, 1970.

APPENDIX V.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 13,067

United States of America, *Appelleé*,
vs.
Clarence C. Elmore, *Appellant*.

ORDER

Defendant, Clarence C. Elmore, having filed a petition for rehearing, supported by an affidavit of John Manning, said affidavit having been obtained after argument and submission of the case and having been filed with the Clerk of the Court, and said petition having been read and considered, it is, with the concurrence of the panel, *ORDERED*,

1. The opinion filed March 16, 1970, is modified by the elimination of the sentence, page 17 of the slip opinion, lines 15-19, beginning "Although the district judge" and ending "after he had finished."

2. The petition for rehearing is hereby denied.

The panel declines to consider the said affidavit of John Manning in entering this order, for the reason that said affidavit has not been considered by the district court and is not part of the record on appeal.

For the Court:

/s/ HARRISON L. WINTER
United States Circuit Judge

A True Copy, Teste:
SAMUEL W. PHILLIPS, *Clerk*
By JO ANN KIRKPATRICK, *Deputy Clerk*